Supreme Court, U.S.
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In The Supreme Court Of The United States

No. 79-1641

BENNIE CARTER, CLIFTON CARTER, EDWARD LEE CARTER, LYNETTE CARTER, MARY JANE CARTER, and TOMMY CARTER,
Petitioner

VERSUS

UNITED STATES OF AMERICA,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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INDEX

Page

Opinions Below 1

Jurisdiction 1

Questions Presented 2

Statutes Involved 2

Statement 4

Reasons for Granting 7

Conclusion 7

Appendix A: Opinion 8

Appendix B: Order Denying Petition for Rehearing 20

Appendix C: Plan for the Random Selection of Juries for the United States District Court for the Eastern District of Oklahoma 21

TABLE OF CASES

Kotteakos v. United States, 328 U.S. 750, 66 S.Ct. 1239, 90 L.Ed 1557 (1946).....4, 5, 7

United States v. Bowline, 593 F.2d 944 (10th Cir. 1979).....4, 5, 7

United States v. Bryant, 291 F.Supp. 542 (D.C. Maine, S.D. 1968) 6, 7

United States v. Local 36 of the International Fishermen, 70 F.Supp 782 (D.C.S.D. Cal. C.D. 1947) 6

STATUTES AND OTHER

18 U.S.C. 1254(1) 3

21 U.S.C. 841(a)(1).....2, 4

21 U.S.C. 846 .....2, 4

28 U.S.C. 1861.....3

28 U.S.C. 1863(b)(3).....3

Plan for the Random Selection of Juries for the United States District Court for the Eastern District of Oklahoma 6

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BENNIE CARTER, CLIFTON CARTER, EDWARD LEE CARTER, LYNETTE CARTER, MARY JANE CARTER, and TOMMY CARTER,
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OPINIONS BELOW

The opinion of the Court of Appeals (App. A, infra, 8-19) is reported at 613 F.2d 256.

JURISDICTION

The judgment of the Court of Appeals (App. A, infra 8) was entered on November 27, 1979 and Petitioners

Petition for rehearing was denied on March 5, 1980 (App. B, infra 20). On March 18, 1980 the Court of Appeals directed that the mandates be stayed pending filing of a Petition for a Writ of Certiorari on or before April 17, 1980. The jurisdiction of this Court is involved under 18 U.S.C. 1254(1).

QUESTIONS PRESENTED

1) Whether or not the conspiracy charged and of which Petitioners were convicted was a single conspiracy or multiple conspiracies constituting indiscriminate trials for transaction and conspiracies in which some had participated and some had not thereby requiring reversal.

2) Whether or not the jury selection plan for the Eastern District of Oklahoma results in a systematic exclusion of jurors residing in certain geographic areas of the district.

STATUTES INVOLVED

Title 21 U.S.C. 841 (a) (1) provides:

> Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—
>
> (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance;

Title 21 U.S.C. 846 provides:

> Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the punishment prescribed for the offense, the com-

mission of which was the object of the attempt or conspiracy.

The following statutes deal with the Jury Selection Plan for trials by jury.

Title 28 U.S.C. 1861 provides:

It is the policy of the United States that all litigants in Federal courts entitled to trial by jury shall have the right to grand and petit juries selected at random from a fair cross section of the community in the district or division wherein the court convenes. It is further the policy of the United States that all citizens shall have the opportunity to be considered for service on grand and petit juries in the district courts of the United States, and shall have an obligation to serve as jurors when summoned for that purpose.

Title 28 U.S.C. 1863 (b) (3) provides:

(b) Among other things, such plan shall —

(3) specify detailed procedures to be followed by the jury commission or clerk in selecting names from the sources specified in paragraph (2) of this subsection. These procedures shall be designed to ensure the random selection of a fair cross section of the persons residing in the community in the district or division wherein the court convenes. They shall ensure that names of persons residing in each of the counties, parishes, or similar political subdivisions within the judicial district or division are placed in a master jury wheel; and shall ensure that each county, parish, or similar political subdivision within the district or division is substantially proportionally represented in the master jury wheel for that judicial district, division, or combination of divisions. For the purposes of determining proportional representation in the master

jury wheel, either the number of actual voters at the last general election in each county, parish, or similar political subdivision, or the number of registered voters if registration of voters is uniformly required throughout the district or division, may be used.

STATEMENT

Petitioner Clifton Carter was convicted of conspiracy and five substantive counts dealing with the manufacture and distribution of marijuana under 21 U.S.C. 841 (a)(1) and 21 U.S.C. 846. Petitioners Bennie Carter, Edward Lee Carter, Lynette Carter, Mary Jane Carter, and Tommy Carter were each convicted of the conspiracy count under 28 U.S.C. 846.

The conspiracy count of which all Petitioners were convicted actually consisted of three separate conspiracies as is discussed in *United States v. Bowline,* 593 F.2d 944, (10th Cir. 1979). The *Bowline*, supra, defendants were charged under the same indictment with the same conspiracy count of which the appellants at bar were convicted.

The trial court in the *Bowline*, supra, decision found that the indictment purported to describe only one conspiracy and in fact set forth three separate and distinct conspiracies: the 1976 crop year conspiracy; the 1977 crop year conspiracy, and the Edinburgh, Texas to Idabel, Oklahoma traffic conspiracy.

In dismissing the conspiracy count in the *Bowline,* supra, decision the court relied on *Kotteakos v. United States,* 328 U.S. 750, 66 S.Ct. 1239, 90 L.Ed 1557 (1946).

In the *Kotteakos,* supra, case thirty-two persons were named in the indictment, nineteen were brought to trial and thirteen were submitted to the jury. Two were acquitted; the jury disagreed as to four; and the remaining seven were found guilty. In the case at bar, the indictment contained 15 substantive charges against various of 36 original defendants. Twelve of these were tried in April 1978. Dismissals were granted as to two, three were found not guilty, and seven, including petitioners were found guilty.

Thereafter, a trial began with nine of the remaining defendants which ended in a mistrial and became the *Bowline* case. After the mistrial, the Court severed the conspiracy count, from the substantive counts and later dismissed the conspiracy count, as to all seven defendants tried therein.

In granting the dismissal of the conspiracy count the Trial Court determined that the facts were sufficiently parallel to the facts set forth in *Koetteakos,* supra, in that there were indiscriminate trials for transactions and conspiracies in which some defendants had participated and some had not. The Supreme Court noted in *Kotteakos* that the right involved was not to be tried en masse for the conglomerate of district and separate offenses committed by other.

Petitioners further submit that the jury which convicted them was selected from a jury panel which resulted from an intentional systematic exclusion of persons residing in appellants geographic location, namely McCur-

tain county. Pursuant to the Jury Selection Plan, (App C, infra 21), Oklahoma is divided into the Muskogee-McAlester Division, comprised of the counties of Adair, Cherokee, Haskell, Hughes, Latimer, LeFlore, McIntosh, Muskogee, Okfuskee, Okmulgee, Pittsburg, Seminole, Sequoyah, and Wagoner and into the Ada-Ardmore-Durant Division, comprised of the counties of Atoka, Bryan, Carter, Choctaw, Coal, Johnson, Love, McCurtain, Marshal, Murray, Pontotoc and Pushmataha.

The trial was held in the Muskogee-McAlester division with the petit jury panel consisting of jurors of that division only. The Grand Jury which returned the indictment consisted of jurors of both divisions, including Petitioners' home county.

Petitioners submit that the present Jury Selection Plan used by the Eastern District of the State of Oklahoma uses a system of selection which results in the exclusion of the residents of Eastern Oklahoma from being called for jury service solely because of the location of their home geographically in the community in violation of the Sixth Amendment.

Petitioners submit that said jury panel was invalid because of such discrimination pursuant to *United States v. Local 36 of International Fishermen,* 70 F.Supp 782, (D.C. S.D. Cal. C.D. 1947) and *United States v. Bryant,* 291 F.Supp 542 (D.C. Maine, S.D. 1968).

REASONS FOR GRANTING

Petitioners submit that based on the *Bowline*, supra, ruling that the "conspiracy" count of which all were convicted was a single count containing multiple conspiracies in violation of *Kotteakos,* supra, it must follow that the identical count be found to have substantially prejudiced the Petitioners in that they like *Kotteakos,* supra, were tried en masse for the conglomerate of distinct and separate offenses committed by others.

Petitioners further submit that even though indicted by a Grand Jury panel drawn from persons of their geographical area, they were not convicted by a panel drawn from persons of their geographic area. Petitioners submit that such exclusion is an intentional systematic exclusion of persons of their geographic area pursuant to *Local 36,* supra and *Bryant,* supra.

CONCLUSION

Petitioners respectfully request that their conviction be reversed and the cases be dismissed for the reason that they were tried and convicted of a single conspiracy count which was in fact multiple and due to the fact that the jury panel which convicted them was drawn from a panel which did not contain persons from their geographic area.

Respectfully submitted,
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APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

Nos. 78-1583, 78-1584, 78-1585, 78-1586, 78-1587, 78-1588, 78-1589

UNITED STATES OF AMERICA,
Appellee,

-vs-

BENNIE CARTER, CLIFTON CARTER, EDWARD LEE CARTER, LYNETTE CARTER, MARY JANE CARTER, and TOMMY CARTER,
Appellants.

Appeal From The UNITED STATES DISTRICT COURT For The Eastern District of Oklahoma (D.C. # 78-19-CR)

Jesse L. Leeds, Muskogee, Oklahoma, for Appellants, Bennie Carter, Clifton Carter, Edward Lee Carter, and Mary Jane Carter.

Brian K. Holland, of Haddon, Morgan & Foreman, Denver, Colorado (Bryan Morgan, Denver, Colorado, with him on the Brief), for Appellants, Lynette Carter, and Tommy Carter.

Julian K. Kite, United States Attorney, Muskogee, Oklahoma, for Appellee.

Before SETH, Chief Judge, HOLLOWAY, Circuit Judge, and BOHANON, District Judge*.

SETH, Chief Judge.

This is an appeal by seven codefendants after a single trial in which all defendants were charged with conspiracy to manufacture, possess with intent to distribute, and distribute marijuana. Various defendants were charged

*Of the Northern, Eastern and Western Districts of Oklahoma, Sitting by Designation.

with one or more substantive counts. The Government moved to dismiss as to two defendants during trial, and three other defendants were acquitted of all charges. Appellant, Clifton Carter, was convicted on all counts, and each of the other Carter family members was convicted of conspiracy. Chuck Sweeten was acquitted on the conspiracy count and convicted on the substantive count of possession with intent to distribute.

The central figures in the marijuana production and sales were James Earl Cook, Ralph Patty (both deceased), and Clifton Carter. Marijuana was cultivated on the farms of Cook and Patty, with proceeds to be divided among Cook, Patty, Clifton Carter, and Paul Stewart. Various members of the Carter family participated in the cultivation, harvest, and transportation of the marijuana. In addition, marijuana was transported in quantities from Edinburg, Texas, to the Carter, Cook, and Patty farms for distribution with the homegrown product.

The Carter family members appealing from the trial below are Clifton Carter, his wife, Mary Jane, and his three sons, Tommy, Bennie, and Edward Lee, and Bennie's wife, Lynette. Chuck Sweeten, an alleged associate of James Earl Cook, also appeals his conviction.

The defendants argue that a severance should have been granted as to each of them in order to avoid the danger of "mass trials" and "blanket convictions." They charge that several conspiracies had been set forth in the indictment even though Count One charges only a single

conspiracy to manufacture, possess with intent to distribute, and distribute marijuana.

The indictment named thirty-six coconspirators in Count I, and followed with fifteen substantive counts, and a large number of overt acts. The trial court made an initial severance, and tried the group of twelve defendants in *this* action. As mentioned above, seven were found guilty and have taken this appeal. At another trial, the court tried another group, this of nine defendants. This ended in a mistrial, and became the *Bowline* case.

In the *Bowline* case after the mistrial the court severed the conspiracy count (Count I) from the substantive counts and later dismissed the conspiracy count as to all seven defendants therein tried. The trial court in *Bowline* found that overt acts numbered one through eleven in County One set forth three different conspiracies: The main conspiracy to cultivate and sell the 1976 crop; the later agreement between Clifton Carter, Ralph Patty, and James Earl Cook to plant the 1977 marijuana on Patty's and Cook's lands and to divide the proceeds, with participation by various defendants; and a final conspiracy involving the purchase and trafficking in marijuana from Texas to Oklahoma. The trial court, in the dismissal of what was designated by the Government as the "conspiracy" count (Count I), apparently relied on *Kotteakos v. United States,* 328 U.S. 750. The defendants were purchasers of marijuana from the Carter enterprise.

The *Bowline* dismissal was appealed to this court by the Government, and we affirmed the dismissal at 593 F.2d 944. In the opinion in *Bowline* we agreed with the trial court that there were three conspiracies alleged in the indictment. One was in Count I, and the others in the portion of the indictment setting forth the overt acts. We held in *Bowline* that the problem could have been handled under Rule 12(b) (2), but we affirmed. It was also indicated that if the problem became evident at trial, an election by the Government could have been requested. We there said:

> ". . . The trial court's reasoning was that the several defendants at trial were a mixed group, some of whom had participated in one or more of the conspiracies, but many of whom had not participated in some of the conspiracies and thus all were subjected to prejudice as a result of being tried in an atmosphere where the acts and conspiracies of others were introduced. This was the underlying reason for the variance that was found and for the action that was taken."

Our opinion in *Bowline*, and the trial court's caveat, was based on the proof developed during some six days of trial before the mistrial was declared, and relating to the defendants there concerned. The trial court had stated as to the dismissal of Count I that:

> "The conclusion which the court reaches in this case is limited to the evidence which was adduced in the trial against the above named seven defendants and is not applicable to the defendants who went to trial in this case on April 10, 1978 [the defendants in this appeal]."

The defendants in *Bowline* were the customers who bought and picked up marijuana at the farms. That was part of the "chain" portion of the enterprise.

In this appeal, the evidence reveals a complete family involvement in the marijuana business in general. Each was a participant in an overall larger conspiracy to raise and distribute marijuana, as charged in Count I of the indictment. Clifton Carter participated in all aspects of all conspiracies. Bennie, Edward Lee, and Tommy Carter all participated in cultivation, harvest, and transportation of the marijuana. There is evidence that Bennie cleared the fields for planting, and Tommy bought the trash compactor for packaging the crop. The evidence indicates that Lynette and Mary Jane Carter picked up a load of the crop at the farm. There is also evidence that each of the family members was present at some time during discussion of the trips to Texas.

It is apparent from the record that there was sufficient evidence for the jury to have found full knowledge by each family member defendant in the details and the extent of each of the several conspiracies. Overt acts were proved as to each family member relating to each conspiracy. The extent of proof relating to Mary Jane and to Lynette Carter was limited, but it showed that they delivered marijuana as above mentioned, and knew of the importation from Texas. Lynette was seen in the fields. All of this was sufficient to include them in each conspiracy.

We said in *United States v. Butler,* 494 F.2d 1246 (10th Cir.), that ". . . mere knowledge or approval of or acquiescence in the object and purpose of a conspiracy without an agreement to cooperate in achieving such object or purpose does not make one a party to a conspiracy. *Jones v. United States,* 365 F.2d 87 (10th Cir.)." This still must be the standard, but here we have more than "mere" approval or knowledge. We have instead proof of an agreement to participate with at least a known core group in an undertaking with a purpose and scope known to these defendants. The inferences or presumptions in *Blumenthal v. United States,* 332 U.S. 539, arising from the circumstances need not be resorted to here. Again, as pointed out in *Butler*, there must be an "agreement" (proved in a variety of ways) to "cooperate." This test has here been met. This does not resemble in any way the circumstances dealt with in *Kotteakos v. United States,* 328 U.S. 750.

On the matter of severance, it is apparent that the fact that a further severance would have improved chances for acquittal will not suffice to require such action. *United States v. Heath,* 580 F.2d 1011 (10th Cir.); *United States v. Champanale,* 518 F.2d 352 (9th Cir.). Each member of the Carter family claims prejudice resulted from non-severance because each was forced to defend against evidence of activities and agreements in which they were not involved, thus generating "guilt by association." However, from a review of the record we must conclude

that even if the trials had been severed as to each family member and/or each conspiracy, the independent evidence against each one of them was and would have been sufficient for conviction.

The only nonfamily member appealing in this case is Chuck Sweeten. Though acquitted of the conspiracy charge, Chuck Sweeten has argued also that nonseverance has prejudiced his case because he was forced to defend against the charge even though there was no evidence to show that he was a party to the conspiracy. The evidence shows only that he purchased marijuana several times at the farm. Indeed, the evidence tended to show that he was not a party and had no knowledge of the agreement to plant or transport the marijuana. However, prejudice cannot be shown by this defendant because he was acquitted on the conspiracy charge, and the evidence against him on the substantive count is uncontroverted. When there is overwhelming evidence to support his conviction on the substantive count of possession with intent to distribute a controlled substance, a defendant such as Sweeten was not prejudiced by submission of a conspiracy count to a jury even though the conspiracy count is not sustained by sufficient evidence. *United States v. Sperling,* 506 F.2d 1323 (2d Cir.). The separation of defendant Sweeten from the other defendants as to the conspiracy shows the discernment of the jury as to the parties to the conspiracies.

The defendants, Lynette Carter and Tommy Carter,

urge that nonseverance has further prejudiced their cases because their attorney was forced into multiple representation of codefendants Lynette, Tommy, and Clifton Carter. They assert that the resulting conflict of interest violates their Sixth Amendment right to effective assistance of counsel. This argument has no merit for two reasons as counsel for the codefendants was privately retained and if any conflict was foreseen or developed during trial, defendants could have retained separate counsel. Further, joint representation is not *per se* improper as long as defendants have competent and efficient representation by counsel. *United States v. Smith,* 464 F.2d 194, 197 (10th Cir.). The evidence indicates that a proper defense was presented and competent representation was provided for all codefendants. Secondly, in this case each defendant was asked individually by the court whether they realized that they had a right to be represented separately; that their positions during the trial might be different from the position of other family members; and that a possible conflict of interest might develop between the positions of one or more family members. Each was then asked whether he or she nonetheless wanted to be represented by attorneys Stipe and Wadley. Additionally, attorney Wadley was asked whether he foresaw any conflict, and was requested to notify the court within three days if any conflict should develop. Under circumstances such as these, we find no merit to the contention that the defendants were denied effective assistance of counsel.

Defendant, Clifton Carter, claims that his constitutional right to remain silent was violated when his tape-recorded conversation with coconspirator witnesses was admitted into evidence. *Miranda v. Arizona,* 384 U.S. 436, does not apply to interrogation in noncustodial circumstances. *United States v. Beckwith,* 510 F.2d 741 (D.C.Cir.), *aff'd,* 425 U.S. 341. The record clearly reflects and it is uncontroverted that during the taped conversations the defendant was not in custody.

In closing argument by the United States Attorney, Clifton Carter was referred to as the "symbolic devil of McCurtain County." It is urged on appeal that this so prejudiced the jury as to prevent a fair trial.

> "[I]mproprieties of arguments by counsel to the jury do not call for a new trial unless they are so gross as probably to prejudice the defendant and the prejudice has not been neutralized by the trial judge before submission of the case to the jury."

United States v. Benson, 487 F.2d 978, 981 (3d Cir.), citing *United States v. Leftwich,* 461 F.2d 586, 590 (3d Cir.), *cert. denied,* 409 U.S. 915. Here, the objection to the prosecutor's statement was sustained and the attorney made an open court apology for making the statement. We conclude that the comment was not unduly prejudicial.

Defense counsel made a pretrial motion for Jencks Act materials. The trial judge denied this motion, stating that the Government would comply with Jencks Act requirements at the appropriate time. The appellants made

no further Jencks motions throughout the trial, but they contend that their right to Jencks matter (and accordingly their right to complain on appeal of any possible Jencks Act violations) was preserved in their pretrial motion. We reject this contention at the outset. The court's order simply observed that the Government "responds [to defendant's Jencks motion] by stating that it will make disclosure of any such statements in accordance with 18 U.S.C. § 3500." This observation hardly constitutes an order placing the Government under a "continuing duty." The Jencks Act protects Government files from unnecessary and vexations "fishing expeditions" by defendants. *Palermo v. United States,* 360 U.S. 343. At the same time the Act assures defendants their Sixth Amendment rights to confront their accusers by compeling the Government to produce "statements" that may be useful for impeachment of Government witnesses. *United States v. Smaldone,* 544 F.2d 456, 460 (10th Cir.). The statute clearly contemplates that the production of Government documents be conditioned upon a timely motion by the defense. *United States v. Keine,* 436 F.2d 850 (10th Cir.). This time is expressly provided in the statute. The pretrial motion was properly denied. The trial judge, of course, need not order production before trial. *Robbins v. United States,* 476 F.2d 26 (10th Cir.).

Appellants also argue that their posttrial motion, which contended that the Government failed to comply with the Jencks Act, sufficiently preserves the issue for ap-

peal. By failing to make a timely motion for the production of Jencks Act materials as the statute requires, appellants wavied any right they may have had to complain on appeal of an alleged lack of governmental production.

The trial court admitted into evidence a tape-recorded conversation, a participant in which was Clifton Carter, and provided the jury with a transcript of the admitted portion of the tape. The transcripts were used only to identify the speakers. Appellant attacks the admission of this tape on the basis of inaudibility and contends that the Government failed to satisfy the requirements for the admission of tape recordings.

The admissiblity of a tape recording that is challenged is inaudible is entirely within the sound discretion of the trial court. *United States v. Watson,* 594 F.2d 1330 (10th Cir.). Upon examination of the record we discern no error in the tape's admission. While we note that "[t]here are portions of the tape where inaudibilities occur" (testimony of Government witness Means), appellant declines to argue that the recording is so unintelligibly inaudible as to render it untrustworthy. *See United States v. Jones,* 540 F.2d 465, 470 (10th Cir.).

The Government laid a proper foundation for the tape's admission. The requirements for a satisfactory foundation are particularly stringent. *See United States v. Starks,* 515 F.2d 112, 121, n. 11 (3d Cir.) (quoting *United States v. McKeever,* 169 F.Supp. 426, 430 (S.D. N.Y.), *aff'd,* 431 U.S. 651.

There was no prejudice to other Carter family defendants from the admission of the tape. The trial judge admitted only portions of the tape, and issued appropriate limiting instructions to the jury as to the proper use of the tape.

AFFIRMED.

APPENDIX B

JANUARY TERM — March 5, 1980

Before Honorable Oliver Seth, Chief Judge, Honorable William J. Holloway, Jr., Circuit Judge, and Honorable Luther L. Bohanon, District Judge*

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
vs.
BENNIE CARTER, CLIFTON CARTER, EDWARD LEE CARTER, LYNETTE CARTER, MARY JANE CARTER AND TOMMY CARTER,
Defendants-Appellants.

This matter comes on for consideration of the petition for rehearing filed by the appellants in the captioned appeals.

Upon consideration whereof, the petition for rehearing is denied.

HOWARD K. PHILLIPS, Clerk

*Of the Western District of Oklahoma, sitting by designation

APPENDIX C

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF OKLAHOMA

RE: Jury Selection.

Miscellaneous

PLAN FOR THE RANDOM SELECTION OF JURIES

Pursuant to the Jury Selection and Service Act of 1968 (Public Law 90-274), the following plan for the random selection of juries is adopted from time to time by the judicial Conference of the United States.

A. Divisions

The Eastern District of Oklahoma is hereby divided into divisions for jury selection purposes, pursuant to Section 1869 (e) of the Act, as follows:

Muskogee-McAlester Division, comprised of the counties of Adair, Cherokee, Haskell, Hughes, Latimer, LeFlore, McIntosh, Muskogee, Okfuskee, Okmulgee, Pittsburg, Seminole, Sequoyah, and Wagner.

Ada-Ardmore-Durant Division, comprised of the counties of Atoka, Bryan, Carter, Choctaw, Coal, Johnson, Love, McCurtain, Marshall, Murray, Pontotoc, and Pushmataha.

Provisions of this plan apply to both divisions unless otherwise specifically stated.

B. Supervision

The clerk of the court shall manage the jury selection

process under the supervision and control of the chief judge, or in his absence, any other judge of the court.

C. Method of Selection

Voter registration lists represent a fair cross section of the community in this district. Accordingly, names of grand and petit jurors serving on or after the effective data of this plan shall be selected a random from the voter registration lists of all the counties within the relevant division.

The clerk shall make the random selection of names as follows: a starting number from 1 to 50 shall be drawn by the clerk by lot and that name shall be selected from the voter registration list of each county along with each 50th name thereafter. (Thus, if the starting number drawn is 18, the 68th, 118th, 168th, etc., names shall be taken from the voter registration lists of each county.) The clerk is authorized to accept the voluntary assistance of the Secretary of any County Election Board in accomplishing the requirements of this paragraph, provided such Secretary certifies that the names furnished were selected in the manner herein prescribed."

D. Master Jury Wheels

The clerk shall maintain a master jury wheel for each of the divisions within the district. The names of all persons randomly selected from the voter registration lists of the counties in a division shall be placed in the master jury wheel for that division. The minimum number of names to

be placed initially in the master jury wheels shall be as follows:

Muskogee-McAlester Division, 2,000 names.
Ada-Ardmore-Durant Division, 1,000 names.

"Any judge of this district may order additional names to be placed in the master jury wheels from time to time as necessary. The master jury wheels shall be emptied and refilled between July 1 and September 1 of 1969, and every four years thereafter."

E. Qualified Jury Wheels

The clerk shall also maintain for each division in the district a separate jury wheel in which are placed the names of persons drawn by lot from the master jury wheel of the division who are not disqualified, exempt, or excused for reasons hereinafter set out.

A juror qualification form approved by the Judicial Conference of the United States shall be sent by the clerk to each person whose name is drawn from the master jury wheel, together with a copy of the letter of transmittal hereto attached. The information supplied by such persons on the forms shall be the basis for determining the persons whose names are to be placed in the qualified jury wheel. A sufficient number of names shall be drawn from time to time from the master jury wheels for this purpose to assure that each qualified jury wheel contains a minimum of 200 names.

F. Summons for Jury Service

The names of persons to be summoned for jury service shall be drawn by lot from the appropriate qualified jury wheel. The number of persons to be summoned, and when, and to what place, shall be determined by a judge of this court and as he shall direct.

Until they have been impaneled in open court, the names of persons summoned for grand or petit jury service shall not be made public unless a judge of this court shall otherwise direct.

G. Excused Persons

The court hereby finds that jury service by persons in the categories or occupational classes set out below would entail undue hardship or extreme inconvenience and that excusing such persons from jury service will not be inconsistent with the Act. They will be excused, therefore, *upon individual request.*

(1) Persons over 70 years of age.

(2) Actively engaged members of the clergy.

(3) Women who have legal custody of a child or children under the age of 15 years.

(4) Actively practicing attorneys, physicians, dentists, and registered nurses.

(5) Persons who have served as a grand or petit juror in a state or federal court within the past two years.

(6) School teachers in public, parochial, or private schools actively teaching.

(7) Sole operators of businesses.

(8) Any person who resides more than 100 miles from the place of holding court.

H. Exemptions

The court finds that exemption from jury service of the groups of persons or occupational classes listed below is in the public interest and will not be inconsistent with the Act. Accordingly, the names of such persons will not be placed in the qualified jury wheels.

(1) Members in active service in the Armed Forces of the United States;

(2) Members of the fire or police departments of any state, district, territory, possession, or sub-division thereof;

(3) Public officers in the executive, legislative, or legislative, or judicial branches of the government of the United States, or any state, district, territory, or possession or sub-division thereof, who are actively engaged in the performance of official duties. Public officer shall mean a person who is either elected to public office or who is directly appointed by a person elected to public office.

I. Disqualification

Every person shall be qualified to serve on grand and petit juries in this district unless he —

(1) is not a citizen of the United States, 18 years of age, who has resided for a period of one year within the district;

(2) is unable to read, write, and understand the English language with a degree of proficiency sufficient to fill out satisfactorily the juror qualification form;

(3) is unable to speak the English language;

(4) is incapable, by reason of mental or physical infirmity, to render satisfactory jury service; or

(5) has a charge pending against him for the commission of, or has been convicted in a state or federal court of record of, a crime punishable by imprisonment for more than one year and his civil rights have not been restored by pardon or amnesty.

J. Determination of Persons to be Excluded

The chief judge of this court, or any other judge of the court, on his own initiative or upon recommendation of the clerk, shall determine on the basis of information provided on the juror qualification form and other competent evidence, whether a person is not qualified for, or is exempt or to be excused from, jury service. The clerk shall enter such determination in the space provided on the juror qualification form and on an alphabetical list of the names drawn from the master jury wheel. If a person does not appear in response to a summons, such fact shall be noted on this list.

This plan shall be come effective and be placed in operation upon approval by a reviewing panel in accordance with Title 28, Section 1863, United States Code.

United States District Judges
for the Eastern District of Oklahoma

The above plan of the United States District Court for the Eastern District of Oklahoma for the random selection of grand and petit juries has been reviewed and found to comply with the requirements of Title 28, Section 1861 to 1874, inclusive, United States Code, and is hereby approved.

For the reviewing panel

Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

No. 79-1641

In the Supreme Court of the United States

OCTOBER TERM, 1979

BENNIE CARTER, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 613 F. 2d 256.

JURISDICTION

The judgment of the court of appeals was entered on November 27, 1979. A petition for rehearing was denied on March 5, 1980 (Pet. App. B). The petition for a writ of certiorari was filed on April 17, 1980, and is therefore out of time under Rule 22(2) of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether there was a prejudicial variance between the single conspiracy alleged in the indictment and the proof at trial.

2. Whether the jury-selection plan of the United States District Court for the Eastern District of Oklahoma deprived petitioners of a jury drawn from a fair cross section of the community in violation of the Jury Selection and Service Act of 1968 or the Constitution.

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Oklahoma, all petitioners were convicted of conspiracy to manufacture, to possess with intent to distribute and to distribute marijuana, in violation of 21 U.S.C. 846 (Count I). Petitioner Clifton Carter was also convicted of five counts of possession of marijuana, in violation of 21 U.S.C. 841(a)(1) (Counts XII-XVI). Clifton Carter was sentenced to consecutive terms of five years' imprisonment and two years' special parole on Counts I and XII and to a general five-year sentence on Counts XIII through XVI to be followed by two years' special parole, to run concurrently with the sentence imposed on Count I, for a total of 10 years' imprisonment. Bennie Carter was sentenced to three years' imprisonment to be followed by a special parole term of two years. Edward, Lynette, Mary Jane and Tommy Carter each received a suspended sentence and three years' probation.

Petitioners were indicted in a 16-count indictment that charged 36 defendants with conspiracy and substantive offenses relating to marijuana cultivation and trafficking. Twelve of the defendants were tried in April 1978. Of these 12, dismissals were granted as to two, three were acquitted, and seven, including the six petitioners,[1] were

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[1]The seventh defendant, Chuck Sweeten, was acquitted on the conspiracy count and convicted on the substantive count of possession with intent to distribute. Sweeten's conviction was affirmed on appeal, but he does not now join in the petition for certiorari in the instant case.

found guilty. A subsequent trial of nine of the remaining co-defendants ended in a mistrial and eventual dismissal of Count I. See *United States* v. *Bowline*, 593 F. 2d 944 (10th Cir. 1979).

The evidence adduced at petitioners' trial showed that during the summer of 1976 Clifton Carter purchased large quantities of marijuana from Ralph Patty and James Earl Cook, who had cultivated the crop on their lands in McCurtain County, Oklahoma (Tr. 18-19). In February and March of 1977, Clifton Carter agreed with Cook and Patty that he would assist in planting marijuana on their lands in return for one-fourth of the proceeds (Tr. 28-31, 217, 467).

As a result, Clifton, Bennie, Tommy and Edward Carter[2] assisted in planting the marijuana that spring and in its cultivation through July 1977 (Tr. 31-34, 215, 218, 365-367, 456-457, 576-577). In early July, however, as a result of a tip about an impending raid, Clifton, Bennie, Tommy, Edward and others quickly harvested the marijuana on the Patty and Cook property and carried it away for processing (Tr. 38-43, 220-225, 367-369, 457-459, 577-579). Lynette was present during the harvesting (Tr. 139, 460).

In the meantime, from January 1977 to September 1977 the co-conspirators made approximately 18 trips from McCurtain County to Edinburg, Texas, to buy more marijuana for distribution to the several customers who came to McCurtain County to buy marijuana from the Carter enterprise. On the majority of these trips Clifton Carter provided cash to purchase marijuana and paid the driver for delivering the loads to the Carters in McCurtain

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[2]Petitioner Mary Jane is Clifton Carter's wife; petitioner Lynette is Bennie Carter's wife. Petitioners Bennie, Tommy and Edward are Clifton Carter's sons.

County (Tr. 25-27, 228, 374, 378-379). In April or May 1977 two other co-conspirators received money from Clifton Carter and drove to Edinburg, Texas, where they purchased 200 pounds of marijuana. Upon their return to the Cook residence in McCurtain County, they delivered the marijuana to Mary Jane and Lynette Carter, who paid them $1,000 (Tr. 228-229, 371). Clifton Carter went back to Texas again to buy more marijuana in June or July 1977 (Tr. 371-372). On several occasions Bennie Carter furnished part of the cash to buy the marijuana (Tr. 27).

ARGUMENT

1. Petitioners contend (Pet. 7) that a variance existed between the indictment and the proof at trial. Although Count I of the indictment charged one conspiracy to manufacture, possess and distribute marijuana, petitioners contend that the government introduced evidence of several conspiracies, thereby prejudicing those petitioners who were not involved in each one of the various conspiracies. In support of this contention petitioners rely on *United States* v. *Bowline*, 593 F. 2d 944 (10th Cir. 1979), in which the court of appeals affirmed the district court's dismissal, in a related trial of severed co-defendants who were purchasers of the marijuana from petitioners, of the same conspiracy count under which petitioners were indicted. The district court in *Bowline* held that dismissal was appropriate because one conspiracy was alleged and three conspiracies were proven,[3] and the evidence showed that not all the defendants participated in each of the separate conspiracies; indeed,

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[3]In *Bowline* the district court found Count I of the indictment in reality charged three conspiracies as against the defendants in that trial: a main conspiracy to cultivate and sell the 1976 crop on the Cook and Patty property, a second conspiracy to plant and cultivate a fresh crop in 1977, and a third conspiracy to purchase marijuana and transport it from Edinburg, Texas, to Oklahoma.

some of the defendants in that case had not participated in any of the conspiracies but were charged under separate substantive counts. The court of appeals agreed that the factual similarity between the *Bowline* case and *Kotteakos* v. *United States*, 328 U.S. 750 (1946), required a dismissal. Petitioners argue that since the *Bowline* court found the indictment and resulting variance was prejudicial as against the defendants in that case, the indictment must have resulted in a prejudicial variance in petitioners' case. This argument was rejected by the court of appeals, on whose opinion we principally rely.

The court in *Bowline* found a variance because "the several defendants at trial were a mixed group, some of whom had participated in one or more of the conspiracies, but many of whom had not participated in some of the conspiracies and thus all were subjected to prejudice as a result of being tried in an atmosphere where the acts and conspiracies of others were introduced" (593 F. 2d at 947). The court made specifically clear, however, that the dismissal was not applicable to petitioners in the instant case, who were tried separately (*id.* at 947 n.1).

The court of appeals in the instant case correctly concluded (Pet. App. 11-12) that no variance was present. In contrast to *Bowline*, where the defendants were the customers who bought marijuana at the farm and were not aware of the various facets of the conspiracy, the evidence in petitioners' trial revealed that each was a participant in every aspect of the overall conspiracy to raise and distribute marijuana as alleged in Count 1. Clifton, Bennie, Edward Lee, and Tommy Carter participated in the cultivation, harvest, and transportation of the marijuana (*id.* at 12). Lynette was present in the marijuana fields during the July harvest (*ibid.*). Both Mary Jane and Lynette received a load of marijuana that

was trucked in from Texas (*ibid.*). Bennie and Clifton furnished money to purchase the marijuana in Texas, and other family members were present during discussions of the trips to Texas. As the court of appeals concluded (*id.* at 13), "[t]his does not resemble in any way the circumstances dealt with in *Kotteakos* v. *United States*, 328 U.S. 750."[4]

2. Petitioners next contend (Pet. 7) that the jury-selection plan of the United States District Court for the Eastern District of Oklahoma, which divides the Eastern District into two divisions, deprived them of a jury drawn from a fair cross section of the community, in violation of the Jury Selection and Service Act of 1968, 28 U.S.C. 1861 *et seq.*, because they were tried in a division that did not include McCurtain County, their home. However, petitioners never raised this issue in the courts below, and therefore neither the district court nor the court of appeals addressed it. A claim under the Act must be raised before the voir dire examination of jurors commences (28 U.S.C. 1867(a)), and petitioners' failure to raise the claim in timely fashion forecloses its consideration when presented for the first time in this Court (28 U.S.C. 1867(e)).

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[4]*Kotteakos* reversed conspiracy convictions where the government charged a single conspiracy, the trial judge instructed the jury on the theory of a single conspiracy, but the proof was insufficient to prove a single conspiracy. All that had been proven were smaller conspiracies that happened to involve a common figure. The court held that the variance was prejudicial to Kotteakos, who was a peripheral figure. 328 U.S. at 768-769, 774. Since there was no variance in this case, it is unnecessary to consider whether a variance would have been prejudicial. 28 U.S.C. 2111.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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